STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2003
v	No. 238078 Charlevoix Circuit Court
ERIC JOHN GIFF, Defendant-Appellant.	LC No. 01-056509-FH

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while visibly impaired (OWI), third offense, MCL 257.625(10)(c). The trial court sentenced him to confinement in jail for six months and probation for twenty-four months. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress all evidence obtained from the stop of his vehicle and to dismiss the charges against him. According to defendant, the stop of his vehicle violated his constitutional right to be free from unreasonable searches and seizures under the United States and Michigan Constitutions. See US Const, Am IV; Const 1963, art 1, § 11. In reviewing a decision whether to suppress evidence, we review a trial court's factual findings for clear error and will affirm unless left with a definite and firm conviction that a mistake was made. *People v Taylor*, 253 Mich App 399, 403; 655 NW2d 291 (2002). However, we consider de novo the trial court's ultimate ruling on defendant's motion to suppress. *Id*.

It is well established that police officers may conduct brief investigative stops short of arrest when they have a reasonable suspicion of ongoing criminal activity. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Christie*, 206 Mich App 304, 308; 520 NW2d 647 (1994). Whether an investigative stop is justified depends on the totality of the circumstances. *Terry, supra*; *Christie, supra*.

There was conflicting testimony regarding the facts and circumstances that resulted in the police stopping defendant's vehicle. Troopers Douglas Sundmacher and Brian Krakowski, the officers who made the stop, testified that defendant's vehicle was "weaving" and "zigzagging" and that defendant was driving fifty-five miles per hour in a forty-five miles per hour zone. In contrast, defendant's witnesses, William and Rebecca Behm, who were driving behind defendant in a separate vehicle, testified that they did not observe defendant's vehicle crossing the

centerline or fog line. In addition, Rebecca Behm testified that she was driving fifty or fifty-five miles per hour and that her vehicle caught up with defendant's vehicle, thus implying that defendant's vehicle was traveling slower than hers, i.e., near the speed limit.

The trial court evaluated the witnesses' testimony and noted on the record that the troopers were sober and trained to be vigilant for drunk drivers, while the Behms had been drinking and were defendant's friends. The trial court then found that defendant was speeding and driving erratically on the night he was arrested. The trial court's resolution of a factual issue at a suppression hearing is entitled to deference, particularly when a factual issue involves the credibility of the witnesses whose testimony is in conflict. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Accordingly, we will defer to the trial court's factual findings regarding defendant's driving.

The fact that defendant was speeding and driving erratically is sufficient to give the police a reasonable suspicion of criminal activity. "[E]rratic driving can give rise to a reasonable suspicion of unlawful intoxication so as to justify an investigatory stop by a police officer." *Christie*, *supra* at 309. In addition, because the facts of this case involved a moving vehicle, fewer foundational facts are necessary to support a finding of reasonableness than if a house or home were involved. See *id*. at 308-309. We opine that the facts of this case could have reasonably caused Troopers Sundmacher and Krakowski to suspect that defendant was unlawfully intoxicated. The investigatory stop was a minimal intrusion of defendant's Fourth Amendment rights in light of his potential danger to the public. *Id*. at 310. Accordingly, the trial court did not err in refusing to suppress evidence obtained as a result of the stop of defendant's vehicle.

Defendant next argues that the trial court erred in refusing to suppress the results of defendant's preliminary breath test (PBT). The trial court denied defendant's motion to suppress the results of the PBT because it determined that defendant had impliedly consented to the test under the implied consent statute. See MCL 257.625c. We conclude that the trial court erred in basing its refusal to suppress the results of defendant's PBT on the implied consent statute because the implied consent statute does not control the admissibility of chemical tests done before the defendant was arrested, and the PBT was administered before defendant's arrest. See *People v Borchard-Ruhland*, 460 Mich 278, 294-295; 597 NW2d 1 (1999). The trial court should have evaluated the validity of defendant's consent pursuant to search and seizure principles under US Const, Am IV, and Const 1963, art 1, § 11. See *Borchard-Ruhland*, *supra* at 295. However, any error that the trial court made in this regard was harmless because despite the trial court's ruling, the prosecutor never attempted to introduce the results of the PBT into evidence. See MCR 2.613(A); *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001).

Defendant next argues that the trial court abused its discretion in admitting the results of defendant's blood test because defendant's consent to the blood test was coerced. However, the record reveals that defendant consented to the blood test and that his consent was unequivocal, specific, and freely and intelligently given. See *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). Again, defendant also impliedly consented to the blood test under the implied consent statute. See MCL 257.625c. The implied consent statute applies to defendant's blood test because defendant was arrested for violating MCL 257.625(1), and the blood test was administered after defendant was arrested. See MCL 257.625c(1)(a); *Borchard-Ruhland*, *supra* at 294-295.

Defendant next argues that the trial court abused its discretion in admitting the results of defendant's blood test into evidence because the prosecutor failed to establish a proper foundation for the admission of the blood test required by *People v Cords*, 75 Mich App 415; 254 NW2d 911 (1977). According to defendant, the prosecutor failed to establish the sixth and seventh foundational requirements articulated in *Cords* and failed to adequately establish a chain of custody for the blood sample. The sixth requirement holds that the prosecutor must show the blood was labeled. *Id*. at 427. The seventh requirement is that the prosecutor show the method and procedures used if the blood was transported or sent. *Id*.

We hold that the prosecutor established a proper foundation that the blood was labeled because the medical technologist who drew defendant's blood testified that Trooper Krakowski "probably" labeled defendant's blood vials. In *Cords*, we held that the trial court did not err in ruling that a sufficient foundation had been laid for the introduction of a blood test, notwithstanding the fact that the nurse who had drawn the blood had not testified at all regarding the labeling of the sample. *Id*. at 428. Moreover, defendant's suggestion that Trooper Sundmacher or Trooper Krakowski was required to testify regarding the labeling of the blood sample is incorrect. Under *Cords*, the medical person who took the blood sample is required to testify regarding the labeling of the blood sample. *Id*. at 427.

In addition, we hold that the prosecutor adequately showed the methods and procedures used when defendant's blood sample was sent to the police laboratory and adequately established a chain of custody for the blood sample. Defendant's suggestion that the absence of the testimony of the laboratory technician who opened defendant's blood sample when it arrived at the Michigan State Police Laboratory destroys the chain of custody and requires the exclusion of the evidence is without merit. Once proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims, any deficiency in the chain of custody addresses the weight of the evidence rather than its admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994).

Defendant finally argues that the trial court erred in instructing the jury on the less serious offense of OWI. Defendant was charged with operating a motor vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(a), or with an unlawful blood alcohol level (UBAL), MCL 257.625(1)(b). The jury convicted defendant of OWI, MCL 257.625(3).[1] The OWI statute provides: "If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered." MCL 257.625(3).

The offense of OWI is a necessarily included lesser offense of OUIL. *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975); *Oxendine v Secretary of State*, 237 Mich App 346, 354-355; 602 NW2d 847 (1999). If evidence has been presented that would support a conviction of a lesser offense, the trial court must instruct the jury on the lesser offense if either party so requests. *People v Torres*, 222 Mich App 411, 416; 564 NW2d 149 (1997). In this case, the trial court was required to give the OWI instruction because the prosecutor specifically requested it. *Id*.

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[1] Because this was defendant's third conviction, the judgment of sentence indicates that defendant was convicted under MCL 257.625(10)(c).

Defendant argues that the trial court's reference to OWI as a "less serious" offense than OUIL was misleading to the jury and deprived him of due process because "when a person is convicted of drunk driving and the charge is enhanced because of a third offense, OWI is no less serious than OUIL." Defendant correctly states that the punishments for OUIL-third and OWI-third are identical. MCL 257.625(8)(c), (10)(c). However, defendant's suggestion that the penalties for the offenses control whether one offense is a necessarily included lesser offense of another offense is incorrect. The penalties for the offenses are irrelevant to whether one is a necessarily lesser-included offense of the other. *Torres*, *supra* at 419. Contrary to defendant's argument, the trial court's instructions to the jury were not misleading because OWI is a less serious offense than OUIL notwithstanding the fact that the punishments for OUIL-third and OWI-third are the same. Moreover, the trial court specifically instructed the jury that "[p]ossible penalty should not influence your decision."

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell